



**State of New Hampshire**  
Public Employee Labor Relations Board

**AFSCME Council 93**

**and**

**Town of Barnstead**

**Case No. G-0315-1**

**Decision No. 2023-308**

Order

On October 13, 2023, the Town filed a motion for review of hearing officer Decision 2023-242 (September 18, 2023), which approved the following bargaining unit:

Unit: Police Lieutenant, Police Sergeant, Police Officer, Fire Rescue Captain, Fire Rescue Lieutenant, Firefighter-EMT, and Police Secretary/Clerk.

Excluded: Fire Chief, Police Chief, Fire Deputy Chief, Police Captain, Administrative Assistant (Fire).

We evaluate the Town's motion pursuant to N.H. Admin. Rules, Pub 205.01, Review of a Decision of Hearing Officer, which provides:

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in

order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

(c) Absent a request for review, the decision of the hearing officer shall become final in 30 days.

(d) The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

The Town challenges the hearing officer's community of interest finding and contends this requirement has not been satisfied based on another hearing officer's dismissal of a petition to establish a similar, but not identical, bargaining unit in the Town 17 years ago. See *AFSCME Local 3657, Barnstead Police & Fire Employees v. Town of Barnstead*, PELRB Decision No. 2006-227 (December 18, 2006).

The PELRB determines bargaining units in accordance with the provisions of RSA 273-A:8 and Pub 302.02 (b), and we recognize that "[t]he principal consideration in determining an appropriate bargaining unit is whether there exists a community of interest in working conditions such that it is reasonable for the employees to negotiate jointly." *Appeal of Town of Newport*, 140 N.H. 343, 352 (1995)(quoting *Appeal of the University System of New Hampshire*, 120 N.H. 853, 855 (1980)).

The 2006 Barnstead case also involved police and fire personnel, with some differences in the exact positions proposed for inclusion in the unit. The parties submitted the 2006 case for decision based on 18 stipulated facts and briefs. The stipulation included, as exhibits, affidavits

from the Police Chief and the Fire Chief.<sup>1</sup> We acknowledge that the hearing officer dismissed the 2006 petition because there was insufficient evidence to prove a community of interest, reasoning as follows:

...[N]either the statute, nor PELRB decisions, nor New Hampshire Supreme Court decisions bar, as a matter of law, the combination of employees from different departments (such as police and fire) provided the other requirements of the statute are met.

The decisions cited establish that the community of interest showing is a fact intensive process and must be determined on a case-by-case basis. As evidenced by the previously cited decisions, testimony from competent witnesses can be particularly important to the process when evaluating community of interest. A recent PELRB decision illustrates the point. In AFSCME Council 93, Local 1444 v. Town of Lancaster, PELRB Decision No. 2004-159, the hearing officer stated, concerning the record, that:

*The record in this case indicates that the only evidence presented by the Union consisted of testimony from the Union representative who filed the instant petition, as well as the Town's personnel policy. The Union offered no testimony from actual employees in the various job classifications. As a result, the Hearing Officer is limited in his ability to assess the various work functions and working conditions of each position in the proposed unit, and the extent to which their work is integrated in service to the Town. The Hearing Officer also has insufficient evidence before him as to the level of "self-felt" community of interest, if any, that exists between employees, given that such evidence is most appropriately presented through testimony of the employees themselves.*

In the present case the only evidence submitted to support the requisite community of interest is the September 29, 2006, Joint Stipulation...AFSCME's reliance on the 1982 Plymouth case (PELRB Decision No. 82-13)<sup>2</sup> is misplaced. The Plymouth decision is not controlling for the reasons already discussed. Each case must be decided on its own merits and the requisite community of interest must be proven. Unlike the Plymouth (and similar) cases, AFSCME did not present any testimony on the issue. This is not to say that testimony is always required in cases involving community of interest or that community of interest will always be proven in the event testimony is given. However, in this case the stipulated record is insufficient to prove the requisite community of interest (Footnote added).

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<sup>1</sup> See PELRB Case No. G-0034-1, *AFSCME Local 3657, Barnstead Police & Fire Employees v. Town of Barnstead*.

<sup>2</sup> Plymouth was an AFSCME bargaining unit established in 1982, which included police and fire personnel.

However, the board never reviewed this 2006 hearing officer decision under Pub 205.01, which means, unlike the present case, the board was never asked to approve, deny, or modify the hearing officer's decision. *See, e.g., Appeal of Hillsborough County Nursing Home*, 166 N.H. 731, 736 (2014)(Hearing officer decision in *Mountain View Nursing Home v. AFSCME Council 93, Local 3685*, PELRB Decision No. 2006-089 (June 1, 2006) relied upon by the County was never reviewed by the board). The precedential value of the 2006 Barnstead hearing officer decision is therefore limited.

The record on which the 2023 hearing officer decision now under review is based includes 26 stipulated facts, 5 affidavits from employees holding positions in the proposed unit (Fire Lieutenant Robbins, Police Officer Cookingham, Firefighter-EMT Normandin, Police Lieutenant Fiske, and Fire Captain Conger) and an affidavit from Town Administrator Montgomery. The record also includes Joint Exhibit 1 and Town Exhibits A – H. The hearing officer was required to render a decision in this case based on this record, and not the record that was presented to the hearing officer in 2006. Likewise, we are rendering a decision on the Town's motion for review based on our evaluation of the hearing officer's decision in this case, not based on a hearing officer's decision issued 17 years ago that was never subjected to board review.

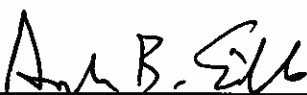
The hearing officer's decision cites the relevant legal criteria and contains appropriate analysis and reasoning to explain the basis for a community of interest finding. The record includes ample evidence of a self-felt community of interest and other factors which demonstrate a sufficient community of interest. The hearing officer's decision is also consistent with the board's nearly fifty-year history of bargaining unit determination, which reveals numerous examples of bargaining units which combine police and fire personnel, as recounted by the hearing officer. In this regard, we note that all existing bargaining units (and corresponding

collective bargaining agreements) are published on the board's website, a review of which shows not only units with police and fire personnel,<sup>3</sup> but other units with quite a diversity of positions covered by a single bargaining unit.<sup>4</sup> There is nothing inherent in the working conditions of law enforcement or fire personnel in Barnstead which precludes their inclusion in the same bargaining unit, and the board's history of bargaining unit certifications and collective bargaining agreements reveals that such positions can bargain together. In short, the combination of police and fire personnel in a single bargaining unit (or of other diverse positions) plows familiar ground.

Upon review, we find the hearing officer considered, and appropriately evaluated, the principle of community of interest consistent with RSA 273-A:8, I; N.H. Admin. Rules, Pub 302.02 (b); and *Appeal of Town of Newport*. We approve the hearing officer's decision, and the Town's motion is denied.

So ordered.

December 7, 2023

  
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Andrew B. Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

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<sup>3</sup> A noteworthy example of the viability of a police and fire bargaining unit comes from the Town of Plymouth. See PELRB Decision No. 82-13. This unit was approved over forty years ago, and it is currently covered by a 2022-25 collective bargaining agreement, see [https://www.nh.gov/pelrb/collective/documents/plymouth\\_town.pdf](https://www.nh.gov/pelrb/collective/documents/plymouth_town.pdf).

<sup>4</sup> Visit <https://www.nh.gov/pelrb/>.

